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SEPARATION OF THE JUDICIARY FROM THE EXECUTIVE

By

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On the main question as to the need for an independent Judiciary and for the need to separate the Executive from the Judicial functions there is no doubt that the consensus of enlightened opinion is in favour of such a bifurcation. But the growing complexities of a civilized State point to the difficulty of bringing in certain functions under what may be strictly called Judicial functions and certain other functions as Executive or purely of an Administrative character. There are obviously functions which are of a quasi-judicial character and which cannot be brought strictly under one head or the other. The main condition of an efficient and sound administration in the latter class of cases is that whereas it must ensure a fair hearing from the point of view of a party concerned, the larger interest of public weal, safety and maintenance of peace as an essential feature of a well-ordered society cannot be lost sight of. It is especially so under conditions where communal clashes, religious bigotry and class feuds might interfere with the pursuits of the average peaceful citizen and disturb public order. The real problem before any Government which undertakes a large scale reform is as to how to effect a synthesis of these two principles. On the one hand the liberty of the citizen understood in its proper sense is the foundation of a democratic and well-ordered society. On the other hand the preservation of public peace and the guaranteeing of it by the Authorities are equally the function of the Government. The recommendations of the Committee recently appointed by the Government for suggesting schemes for the separation of the Judiciary from the Executive as to the bifurcation of those functions so far as the preventive sections of the Criminal Procedure Code are concerned, will have to be canvassed both from the point of view of the broader principle adverted to above and the advisability of such a bifurcation for the efficient working of the preventive provisions of the Code.

Analysing the proposals from this angle of approach one finds it difficult to support the recommendations. Under the scheme as outlined the Executive Magistrate is to set the Judicial Machinery in motion and also to act as a kind of assistant to the Judicial Magistrate by issuing the warrants for the arrest of the accused, reading out the substance of the initial order if he is in Court, dispensing with his personal attendance if the Magistrate sees sufficient cause and permitting him to appear by a pleader. Having regard to the very nature of the functions exercised under Chapters VIII to XII of the Criminal Procedure Code, the division of the proceedings into two stages and a Judicial Magistrate taking on an enquiry started by an Executive Magistrate is not likely to lead to a proper working of the provisions of those Chapters and there seems to be much to be said in favour of the view of the majority of the Coleridge Committee set out in para. 85 of the Report wherein they point out that the functions under the preventive sections could not be divided into stages and one stage called Executive and the other Judicial. It is interesting to note that while the Committee is against the final orders under these sections being passed by the Magistrate who initiates the proceedings the Committee does not see any objection to the Judicial Magistrate exercising the functions of the Executive Magistrate and the Executive Magistrate taking on the proceedings at the point at which the proceedings are left by the Judicial Magistrate.— (*Vide* para. 82). The net result of the scheme may be the continual shifts from one Magistrate to the other—Executive Magistrate to Judicial Magistrate from Judicial Magistrate to Executive Magistrate and then again to a Judicial Magistrate. Apart from any abstract theory, is there not something to be said for the view that a Magistrate who passes an order in the first instance and who may have to give directions for certain preventive acts would be in a better position to deal with cases of this description than a fresh Magistrate at the final stage.

The procedure to be adopted in regard to a Magistrate taking cognizance of offences cognizable and non-cognizable has received a rather summary treatment at the hands of the Committee. It cannot be gainsaid that in regard to this subject as well, there are practical difficulties in visualising at what stage the Judicial Magistrate is to step in and at what stage the Executive Magistrate is to step out.

The success of the scheme as to the separation of the Judiciary from the Executive as proposed by the Committee would to a great extent depend, as is realised by the Authors of the Report, on the recruitment of the proper personnel and the High Court having a predominant voice in the selection of the personnel as well as in the effective supervision of the functions discharged by the Magistracy. The Committee are quite alive to the provisions of the Government of India Act bearing on the subject of the Authority invested with the

power to appoint Magistrates and have been considered by the Committee in the course of their recommendations. A passing reference to the relevant provisions of the Constitution Act may not be out of place. The Government of India Act does not make any provision for Sessions Judges and Magistrates as distinguished from Civil Service. The Magistracy also is included under the general expression of Civil Service as distinguished from Military or Defence Service. Under section 254 and the succeeding section the expression 'District Judge' includes a Sessions Judge, Additional Sessions Judge and so on. The Governor of the Province is invested with the power to appoint a Sessions Judge by exercising his 'individual judgment' according to the connotation of that term in the Government of India Act. The appointment to the subordinate Civil Judicial service is with the Government and normally will have to be made from the list submitted by the Public Service Commission. Section 266 of the Act, however, enables the Governor in his discretion—that is without reference to the Ministry—to make regulations generally or in any particular class of cases that it shall not be necessary for a Public Service Commission to be consulted. Whether this will enable the Governor to substitute the High Court for the Public Service Commission is a point which is not dealt with by the Committee. The Committee in the course of their recommendations in paras. 146 to 149 of the Report do not seem to have appreciated the difficulty experienced in the recruitment of District Munsiffs. In view of past experience in regard to the recruitment of District Munsiffs, it is very doubtful whether the High Court or a High Court Judge will function as a mere Advisory Body without the guarantee that their recommendation will be accepted as a matter of course by the Government for the time being. It is very doubtful whether the suggestion in paragraphs 146 to 149 of the Report in regard to this matter are likely to meet with the approval of the High Court.

From the Report it is not clear whether according to the scheme suggested by the Committee the distribution of powers to the different Magistrates in the District after consultation with the District Magistrate under section 256 is to be exercised in consultation with the Judicial District Magistrate or the Executive District Magistrate though it would appear that the framers of the Government of India Act possibly proceeded on the footing that a District Magistrate who is the Executive Head of the District may be the proper Authority to be consulted in such matters. No constitutional or legal point is involved in this but it is certainly a point that deserves independent consideration as a part of the general scheme of recommendations by the Committee.

As part of the scheme it may be necessary to amend section 11 of the Criminal Procedure Code but that need not stand in the way of the recommendations being given effect to.

SUMMARY OF ENGLISH CASES.

HORN, *In re*: WESTMINSTER BANK, LTD. *v.* HORN, (1946) 1 Ch. 254 (C.A.).

Will—Construction—Direction in will that a son to whom the testator had given a loan should take the loan in satisfaction of his share of residue—If operates as release or gift of the loan to the son when there is no residuary estate.

A will provided that money lent by the testator during his lifetime to his children should be "taken in or towards satisfaction of the share of such child or his or her issue taking by substitution in my residuary estate". On a construction of the will there being no share of residue,

Held, that the provision is not a direction for absolute taking but a direction for taking on certain conditions and for certain purposes and for no other purposes. The clause cannot operate unless there is a residue and therefore cannot be construed as forgiveness either in whole or in part of such loans and cannot operate as a discharge.

[Dicta in (1897) 1 Ch. 325 (331, 333), considered and (1915) 1 Ch. 853, disapproved.]

THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, *In re*, (1946) 1 Ch. 265 (C.A.).

Receiver—Receiver of rents and profits of house—Lease without sanction of Court—Sanction if can be accorded ex post facto.

No lease can be granted by a receiver without the sanction of the Court and the receiver will be exceeding his authority in granting a lease without such sanction or the concurrence of the debtor. But there is no reason why the Court should not have power to give the sanction to a letting by a receiver on a date after the letting in fact had begun. [(1913) 2 Ch. at 96, followed.]

DWYER *v.* MANSFIELD, (1946) 1 K.B. 437.

Tort—Nuisance—Trader selling rationed vegetables—Queues forming in front of shop obstructing neighbouring shops—Trader if liable for nuisance or damages caused thereby.

M, a shopkeeper carrying on business as green-grocer in selling potatoes and fruits in rationed quantities caused queues to collect in front of his shop which extended to the front of neighbouring shops. The neighbouring shopkeepers claimed damages for nuisance against *M*, alleging interference with their respective businesses by the causing of queues to collect opposite their shops, whereby they lost custom.

Held, even if a nuisance had been proved it cannot be said that *M* created or was responsible for it. *M* did not do anything which was unreasonable or unnecessary and so unjustifiable as to make him liable.

BOOK REVIEWS.

THE CODE OF CIVIL PROCEDURE—SELECT QUESTIONS AND ANSWERS WITH A COMPLETE ANALYSIS OF THE CODE, by Two Law Graduates, published by Company Law Institute of India, Ltd., 17, Dr. Nair Road, Thyagarayanagar, Madras. 1945. 115 Pages. Price Rs. 2-8-0.

As an attempt to make the task of the student appearing for the examination easy, this publication is likely to be welcomed by the students. The book is divided into two parts, the first giving in brief outline the procedure followed under the Code in the conduct of civil litigation, and the second giving select questions set in the University examinations with detailed and exhaustive answers to them. As could be expected, in a booklet of this size, it is only the very broad principles and essential features of the Code and some of its very important provisions are dealt with. But the answers to the various questions are clear and full. The printing and get up of the book is quite good.

CRIMINAL LAW AND PROCEDURE—SELECT QUESTIONS AND ANSWERS WITH COMPLETE ANALYSIS OF THE CODES, by Two Law Graduates, published by Company Law Institute of India, Ltd., 17, Dr. Nair Road, Thyagarayanagar, Madras. 1946. 240 Pages. Price Rs. 3-8-0.

This is a companion booklet to the one on Civil Procedure Code by the same authors and published by the same Company. A good attempt at an analysis of the Penal Code and Criminal Procedure Code has been made and a student appearing for an examination would find in the book sufficient information to enable him to tackle the examination questions. To further help him, questions from the University examinations have been given with full and clear answers. Considerable pains have been taken by the authors to make the publication serve the purpose intended by them, to help the student appearing for an examination.

INCOME-TAX SECTIONS RE-ARRANGED, by D. H. Nanavati, B.A., LL.B., published by N. M. Tripathi, Ltd., Princess Street, Bombay. 199 Pages. Price Rs. 5-8-0.

The book contains four lectures delivered, under the auspices of the Bombay Incorporated Law Society, to Articled Clerks studying for the Solicitors' examination. Instead of following the usual method of dealing with the subject according to the serial order of the sections of the Act, the author has preferred to deal with the subject topically under different heads necessitating the re-grouping of the different sections of the Act having relevancy to those particular topics. The subject has been sought to be covered under four broad headings of Taxation and Exemption, Classification of Assessees, Calculation and Procedure and Precautions and Prosecutions. The important sections of the Act have been fully explained and the statements of law are supported by relevant, important and recent decisions. In a book of this type one could not expect the case-law to be exhaustive. To facilitate easy reference to any particular point, the bare text of the Act has been given at the end of the book which is sure to enhance the value of the book. This small book would come in handy not only to the student of law but also to the businessmen and the general public in matters relating to income-tax.

SALES TAX MANUAL, by Ratilal Keshavlal Desai, B.A., LL.B., published by Chandrakant Chimanlal Vora, Law Book Seller and Publisher, Gandhi Road, Ahmedabad. 1946. 119 Pages. Price Rs. 4.

Businessmen in Bombay, small or big, have equally to be alive to and conversant with the provisions of the Bombay Sales Tax Act and the rules framed thereunder by the Provincial Government. The book under review gives the full text of the Act with comments on the different sections as also the rules made under the Act together with all forms to be used by the public and the department of Government concerned. As a book of reference it is sure to be found very useful by businessmen and the Sales Tax Officers.

SUPPLEMENT TO THE BOMBAY INDUSTRIAL DISPUTES ACT, by Prabhudas Balubhai Patwari, B.A., LL.B., with Prasannadas Damodardas Patwari, LL.B., published by Tarachand M. Ravani, Bharati Sahitya Sangh, Ltd., Mimraj Building, Kalbadevi Road, Bombay. 88 Pages. Price Rs. 6.

In these days when labour disputes seem to be a daily feature in industrial areas, this small book containing all the latest decisions given by the Industrial Court is sure to found not only useful but indispensible by industrialists and workers, labour organisations and lawyers alike. The important Hints to employers and employees contain in a connected form all necessary information for urgent reference. The cases under the Act, the Rules, the standing Orders for operatives and the Standing Orders for clerks have all been noticed and the points involved in them have been stated clearly.

A HANDBOOK OF CRIMINAL LAW, by S. Krishnamoorthy, M.A., Barrister-at-Law, published by N. R. V. Raghavan at V. S. N. Chari and Company, Nungambakkam, Madras. 1946. 591 Pages. Price Rs. 8.

The three major enactments relating to Criminal Law, viz., The Indian Penal Code, The Indian Evidence Act and the Code of Criminal Procedure are given in one single handy volume with

short notes and case-law on important sections. The incorporation of the Criminal Rules of Practice that have been made by the High Court, brought up to date, is sure to be appreciated by the Legal Practitioners. As a book of daily reference containing the necessary enactments for a practitioner in Criminal Courts, it really satisfies a long-felt want, and is bound to be found very useful.

HANDBOOK ON MERCANTILE LAW, by E. Venkatesam, B.A., M.L., 1946. 556 Pages. Price Rs. 9.

Mercantile Law is a very wide subject and an attempt to present it within a short compass cannot be successful unless the author himself is well versed and thorough with the subject in all its different branches. Mr. Venkatesam has dealt with the whole subject in a very analytical form and the book is literally packed with valuable and very useful information. As Mr. Justice Govindarajachari remarks in his Foreword to the book that it is "a book which deserves commendation in more ways than one." The author has divided the book into two parts, the first one dealing with the law relating to Contracts (general), Bailments, Indemnity and Guarantee, Agency, Sale of Goods, Partnership and Negotiable Instruments and the second dealing with the Law relating to Companies, Insolvency, Carriers and Shipping, Insurance, Securities and Arbitration. In the Appendix, a summary of the important provisions of the Indian Factories Act, Workmen's Compensation Act, Trade Disputes Act, Trade Unions Act, and Societies Registration Act, have been given. In the coming "era of expanding commerce and industry" Indian businessmen and industrialists cannot afford to be ignorant of the basic principles of the various branches of Mercantile law and we cannot think of a better or more suitable book to recommend to them than the present one. Keeping in view the scope of the book, it is only the important and leading decisions, English and Indian that have been referred to wherever necessary. We have great pleasure in welcoming this book as a really worthy contribution on a subject of growing importance.

THE MADRAS BUILDING (LEASE AND RENT CONTROL) ACT (XV of 1946) with THE MADRAS ESSENTIAL ARTICLES CONTROL AND REQUISITIONING (TEMPORARY POWERS) ACT (XIV OF 1946), THE MADRAS TENANTS AND RYOTS PROTECTION ACT (XVIII OF 1946) and THE MADRAS PRESERVATION OF PRIVATE FORESTS ACT of 1946 by Neti Subramanyam and S. Krishnamoorthy, Advocates, Madras. 1946. 64 Pages. Price Rs. 1-4-0.

This booklet contains the four recent enactments of the Madras Legislature in regard to the Lease and Rent Control of Buildings, the Protection of Tenants and Ryots, the Control and Requisitioning of Essential Articles and the Preservation of Private Forests. A short commentary on Act XV of 1946 with the Select Committee changes have been added. As a collection in one single book of these different enactments this publication is useful as a handy book of reference.

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